STANDING COMMITTEE ON LEGISLATION

TAXATION LEGISLATION AMENDMENT BILL 2014

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 30 OCTOBER 2014

SESSION FOUR

Members

Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Lynn MacLaren

Hearing commenced at 12.59 pm

Adjunct Professor GREG McINTYRE, SC
Council Member, Law Society of Western Australia, sworn and examined:

Mr GRAHAME YOUNG
Barrister, sworn and examined:

The CHAIR: Welcome. On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation. and, after that, please state your full name and the capacity in which you appear before the committee.

[Witnesses took the oath or affirmation.]

Prof. McIntyre: My name is Gregory Malcolm Grant McIntyre. I am a barrister and I am appearing as a member of the Council of the Law Society of Western Australia.

Mr Young: My name is John Grahame Young. I am usually known as Grahame Young. I am a barrister and I am a member of the Law Society and I represent the Law Society on this occasion.

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you now like to make an opening statement to the committee?

Mr Young: I have prepared some what I have called "speaking notes", just to assist me, which I have made copies of. The part of the Law Society's submission to which I wish to speak is directed to a particular technical consequence of the legislation. What we have here is a very convoluted legislative scheme. We start out with an exemption—I am using just the Duties Act, but what I say applies pretty much equally to the Pay-roll Tax Act and the Land Tax Assessment Act. They have, of course, somewhat different taxable bases; obviously payroll tax is wages, land tax is either use or ownership of land, and the Duties Act is about acquiring land. There is an exemption for dutiable transactions for charitable and other purposes. There is now to be a carve out from that for relevant bodies—this is where it gets, as I say, convoluted, because that is a defined term; it is defined by the inclusion of certain bodies and it is defined by the exclusion of certain of those from those that are included. It also includes groups under certain acts, including payroll tax grouping; when we go to the Pay-roll Tax Act, there is a de-grouping provision in that act. There is a specific exclusion for public benevolent institutions and there is, of course, some question about how that relates to the whole of the definition of "relevant bodies" that are intended to be excluded from the exemption.

Finally, there are quite elaborate provisions for what is called a "beneficial body determination", which is a fall-back if there is a body that ought to get exempted but somehow does not. I say all that by way of background to contrast with the fact that under proposed section 95, subsections (2) and (3), a body related to a relevant body is also excluded even though they are not themselves relevant bodies—so all you have to be is related. Then related bodies are defined, or a person is said to be related if they hold it as trustee, and any relevant body—that is, people to be excluded—are a beneficiary or a potential beneficiary. There are no exclusions from that. So you cannot use the relevant exclusions in the definition of a relevant body, and you cannot use the beneficial body procedure—if you are related, that is it.

The particular issue is that there are many charitable entities—so there will be trusts, foundations and institutions—and, in particular I refer to what are called "ancillary funds", which might be either private ancillary funds or public ancillary funds. These are established to get benefits under the income tax acts. There are model deeds prescribed for these and basically they say that beneficiaries are any charitable body. So, there are ancillary funds, but also people under their wills will set up charitable trusts, and people in their lifetime set up charitable trusts or foundations and endow them, and I am sure you would be aware of many of these. Although they have this very wide range, they usually concentrate on a specific area of interest to people. It might be Indigenous welfare, it might be education, it might be music scholarships, but they have this wide range. Because that would include a relevant body necessarily—because a relevant body must be a charitable body—all of these would be excluded from benefit even though they never intend to give anything to the Chamber of Commerce or any other professional or trade association et cetera.

The Law Society submits that this is an unintended consequence. We made a suggestion in the submission that there be a power for the commissioner to make a determination. We looked at section 162, which is a power under the landholder provisions to say that people are not related—that is why we looked at that one. I was advised this morning that the Office of State Revenue has suggested that section 158 might be a better model. That is the provision that says that the commissioner can say that if there is a discretionary trust and it is not equitable to say that every beneficiary owns or is a 100 per cent beneficiary, he can make a determination. I would agree that that is quite a suitable means to be adopted. The test there is inequitable. It is not a well-defined test. But there are cases. There is a use of inequitable in some New South Wales duties legislation, which has gone before the courts and the courts have not had difficulty in saying, "Yes, we understand what the purpose of the legislation is; we understand what the facts are; and, yes, we can come to our decision in place of the commissioner's decision". So that is, I think, an acceptable alternative.

The other alternative is that you could just put in the act that a trustee is not to be taken to be related if there is no realistic possibility—I am not drafting; I do not want to fall into the trap of trying to draft for parliamentary counsel—but if there is no realistic possibility that a relevant body, the ones that are intended to be excluded, might benefit. That is my part of the submission. I think that answers most of the questions, with a couple of exceptions which Mr McIntyre will deal with. They are the third dot point to question 2 and question 5.

The CHAIR: Are you aware of particular discretionary trusts and fourth-limb charities that would be affected by the bill; that is, a particular instance?

Mr Young: This morning I got a brief on behalf of what is called a private ancillary fund. I am not at liberty to disclose the name, of course, because of confidentiality, but I can say that it has assets of about $8 million and that it is returning about 10 per cent, so, from those two facts I deduce that that must have land in its assets. It has prescribed beneficiaries, which are any charitable body. So that one would be eliminated from benefit under the three acts, because these bodies sometimes buy land for their own headquarters and purposes. The ancillary funds only exist to dole money out to other charities; they are not allowed to undertake the charitable activities themselves. But, of

course, they may buy land as an investment so they can get the income to distribute to the charities. But there are an awful lot of these ancillary funds out there.

The CHAIR: Are you able to quantify the effect of proposed section 95 on the Law Society of Western Australia as trustee pursuant to the Law Society Public Purposes Trust Act 1985 or otherwise?

Prof. McIntyre: I will deal with that. I think probably the likely effect will be nil provided that the appropriate application is made for it to become an exempt body. As you are aware, the trust fund under the Law Society Public Purposes Trust Act was set up under a statutory provision. I think it is probably right that that then makes it a public authority as defined under section 3 of the Duties Act —

> any other person or body, whether corporate or not, who or which, under the authority of a written law, administers or carries on for the benefit of the State, a social service or public utility;

There may be an issue about whether it is doing it to the benefit of the state, but clearly it has been set up by state legislation, so it would be arguable that it could apply for exemption. If it could not, then there would be issues. If the narrow interpretation was taken of the phrase "benefit of the state" and it was not eligible for exemption, then it is a charitable organisation that could come under this umbrella, because clearly it is related to the Law Society of Western Australia, which is one of the prescribed bodies, being a professional association. That is the answer to that question. I should say that our primary position is that we are not here to argue for the benefit of the Law Society. It is mainly what you have heard—that there are general benefits that flow out to the broader community. But using the Law Society as an example, it has a number of charitable trusts which it deals with.

[1.15 pm]

Hon DONNA FARAGHER: Sorry, but that is the question I was going to ask in terms of the trusts being set up and the charitable organisations that you support, just to give us an understanding, I suppose in a practical sense, in terms of how this might apply.

Prof. McIntyre: Yes. I will hand up to you, when I have finished, a copy of the Law Society's 2013–14 annual report. I was planning to bring several copies, but a pipe burst in our ground floor two days ago and our whole organisation has been shut down for a couple of days. I can probably get other copies in due course. The report tells you that the Law Society currently administers three trusts. There is the Public Purposes Trust, which is under statute. There is also the Chief Justice's Youth Appeal Trust, which generally collects money and then applies it to charitable purposes relating to legal issues, typically, for example, it funded, I think, the Noongar patrol scheme a year or so ago. It focuses on those sorts of issues which have a youth and law-related matters, but clearly charitable purposes. It also, of course, is the trustee of the Law Mutual Fund, which deals with claims for liability and solicitors. I do not know whether that would fit within the charitable trusts, but that is one of the other trusts which it administers. It has a number of those sorts of trusts. To give you an idea of the Public Purposes Trust, there is a pie chart in the annual report which points out the split up between expenditure on community legal centres, education, financial counsellors and support services, public interest law clearing house, and universities. The vast majority of that—80 per cent—is distributed back to community legal centres that provide pro bono services, or free services, across a range of areas to the community. There is one per cent on universities, six per cent on the public interest law clearing house, which, again, is a process for providing legal advice to people who cannot otherwise afford it, and 10 per cent is on education. I will provide that to you. Given the skills of the Law Society, I expect that we will not have any difficulty obtaining such exemptions as are available to us at law. Our real concern is the vast range of charitable bodies out in the community who may not even be aware that they are being affected

by this legislation by the process that my friend has just pointed out. That is probably our main issue.

The CHAIR: You propose an amendment similar to section 162 of the Duties Act 2008. Are you able to advise the committee of the terms of an amendment that would satisfy the Law Society, and which section should be amended?

Mr Young: On that, as I mentioned in my opening statement, the suggestion is that a provision more like existing section 158 could be brought into proposed subsection (3); it would fit within that subsection and it would be quite similar in its drafting to section 158.

Prof. McIntyre: In addition to that, if the parliamentary draftsman was not happy with that arrangement, section 96A(f)(ii) refers to the concept of a related body corporate. That then refers you to the Corporations Act section 9, which gives you a definition of "related body corporate". It also gives you a definition of "related party", and related party is then defined in 228 of the Corporations Act. I really just throw those into the mix for the parliamentary draftsman to consider as to whether that is of any assistance to him.

The CHAIR: I am sure we will pass it on! Why do you consider a legislative amendment preferable to seeking a ministerial beneficial body determination referred to in proposed section 95(2); and does this section cover the circumstances that concern you?

Mr Young: I can answer that question. The first part is that for a body who is related that is in itself a relevant body, that beneficial body determination is not available, so we need another mechanism. The second comment I would make is that that is quite an elaborate scheme for somebody who falls within the relevant body definition prima facie and therefore is, prima facie, to be excluded and therefore is requesting special consideration to be given. These related parties are not by definition within relevant bodies, so rather than have them go through quite an elaborate process, we think it would be preferable to have a short form process whereby the commissioner can make a determination.

The CHAIR: Do you have similar concerns about proposed paragraph (f) of the definition of "relevant body", which I know you have talked about, which provides that certain related bodies will lose taxation exemption if they are related to other categories of relevant bodies, such as professional associations? I think you probably covered that in your opening statement.

Mr Young: Yes.

The CHAIR: The bill provides the Minister for Finance with the power to make a beneficial body determination to reinstate tax exemption status. Why are guidelines in relation to this discretion appropriate? Why do you consider guidelines by regulation appropriate?

Prof. McIntyre: The society was concerned that section 96C(1) just says that on application, the minister, with the Treasurer's concurrence, may determine that a relevant body is a beneficial body. It gives the minister no other guidance as to what criteria he or she might use to make that determination. Just as a matter of good administrative law, we thought it was probably that some guidance be provided to the minister as to what criteria might be applied. It could be as simple as saying that the minister shall take into account whether the sole or dominant purpose of the body is —

(i) the relief of poverty; or

(ii) the advancement of education; or

(iii) the advancement of religion;

which are words taken from 96A(d) of the proposed amendment. That makes his discretion more obviously directed towards that purpose. In our written submission, we proposed that it be by guidelines, or guidelines by regulation. That is one way of doing it. That was the compromise that

we arrived at when we filed the submission. My personal view, I should say, is that I think it would be better if it was in the legislation, and you could readily put that sort of provision into section 96C(1)(a). I will leave you with that set of words.

Hon DONNA FARAGHER: If guidelines were proposed, would you have difficulty under the circumstances that you propose that the minister would still have that decision-making power—that it would still rest with the minister—or do you think it would be appropriate that it was undertaken by somebody else, which is a concern that has previously been raised?

Prof. McIntyre: As a general proposition, the Law Society has been making submissions for years in relation to a whole range of issues concerning ministerial decision-making versus expert bodies. I have not asked the membership, but I think consistently with those sorts of submissions which have been made—for example, the Law Society has a very strong view about ministerial-decision making on planning matters and has made many submissions on that topic, suggesting that rather than a ministerial discretion, which is difficult to challenge, if you like, it ought to be done by a town planning tribunal, so if you apply that same logic —

The CHAIR: Unless you are the minister, of course!

Prof. McIntyre: Yes. That would be consistent with the Law Society's view that it is better to have somebody who is expert in the field at least making a primary decision, which you then get a set of reasons for, ideally, which you can then examine to see whether you ought to challenge it rather than leave it as a broad ministerial discretion.

Hon DONNA FARAGHER: Thank you.

Hon LYNN MacLAREN: We heard earlier today through submissions that one possible way of defining "relevant body", other than, as you propose, "sole or dominant purpose", might be "principal purpose", and the rationale for using that in relation to the definition of what the body does in relation to promoting trade, industry or commerce. It has been put to us that "principal purpose" is a narrower definition that would have many benefits, including reducing the scope of the mixed charities that are not fourth-limb charities being caught by paragraph (d); avoiding the confusion between activities and purposes in the definition, which you have not discussed yet; and there would be less work for the re-inclusion mechanism. I wonder whether you had a view about whether "principal purpose" would be more appropriate than "sole or dominant purpose" in further defining what a relevant body is.

Mr Young: My reaction to that question is that a sole or dominant purpose is a very difficult test, because many organisations will have what I might call "ancillary purposes", so there might be a body whose principal purpose is education but has another purpose related to professionals who are members of the body. So, yes, I would see some merit in that, because passing a test which says we only have a sole purpose of education may be very difficult for those sorts of organisations.

Hon LYNN MacLAREN: Thank you.

Prof. McIntyre: The legislation needs to focus on when a body is engaged in a charitable activity and when it is not, rather than grabbing the net covering the lot regardless of what it is they are doing at any particular time. I do not know. That may require quite a bit of rejigging of this form of the legislation. The Law Society again is quite a good example, where I indicated it runs at least two trusts that could be regarded as charitable, and one perhaps not, and then its general membership functions. Clearly, it is a multi-functional organisation and, clearly, it should be paying tax when it is dealing with matters which are not charitable and not paying tax when it is dealing with matters which are, and that is where the net focus needs to be.

The CHAIR: Thank you. On behalf of the committee, I thank you both for coming in and appearing before us. It has been most helpful.

Hearing concluded at 1.29 pm